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## MASLINDA ISHAK

**v.**

## MOHD TAHIR OSMAN & ORS

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
SULAIMAN DAUD JCA
JEFFREY TAN JCA
[CIVIL APPEAL NO: W-01-156-08]

C

1 SEPTEMBER 2009

***TORT:*** *Damages - Negligence - Vicarious liability - Invasion of privacy - Principles applicable - Whether principal jointly and severally liable for wrongful act of agent*

D

***TORT:*** *Negligence - Vicarious liability - Claim for damages - Invasion of privacy - Principles applicable - Whether principal jointly and severally liable for wrongful act of agent*

***TORT:*** *Vicarious liability - Principal's liability for agent's wrongful act - Invasion of privacy - Claim for damages - Principles applicable*

E

***CIVIL PROCEDURE:*** *Damages - Invasion of privacy - Vicarious liability - Principles applicable - Whether principal jointly and severally liable for wrongful act of agent*

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The appellant was arrested at a nightclub in a joint operation by officers of Angkatan Relawan Rakyat Malaysia ('RELA') and Jabatan Agama Islam Wilayah Persekutuan, Kuala Lumpur ('JAWI'). The 1st defendant, an officer of RELA, was charged under s. 509 of the Penal Code for invading the appellant's privacy by taking numerous photographs of the appellant urinating in the truck she was placed in after her arrest. He pleaded guilty and was convicted accordingly. The appellant brought a claim for, *inter alia*, general, aggravated and exemplary damages against the 1st defendant, the 2nd respondent, the Director General of RELA, the 3rd respondent, the Director of JAWI and the 4th respondent, the Government of Malaysia. The trial judge found for the appellant, but only in respect of the 1st defendant and not the respondents. The appellant, being dissatisfied, filed the present appeal.

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**Held (allowing the appeal with costs)**
**Per Suriyadi Halim Omar JCA delivering the judgment of the court:**

**(1)** On the facts, the 1st defendant was present at the scene, not on his own volition, but on instruction. He was not only under the direct supervision of RELA but was, on that particular night, also subject to the direction of JAWI, with his duties shuttling from ensuring the security of those who participated in the exercise to keeping an eye over those who were arrested. Since the 1st defendant took the unauthorised photographs in the course of the work he was instructed to carry out, at a time when the operation was in progress, the respondents must be held to be vicariously liable. It is trite law that when an injury or loss is caused to a third person by the wrongful act of an agent acting within the scope of his authority, his principal is jointly and severally liable with him. Thus, the respondents must jointly and severally bear the burden of the first defendant's liability. *Keppel Bus Co Ltd v. Sa'ad Ahmad* (foll); *Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors* (foll); *Yeo Tin Sang v. Lim Choo Kee* (foll). (paras 22 & 23)

*[Order accordingly.]*

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu telah ditangkap di sebuah kelab malam dalam suatu operasi bersama oleh pegawai-pegawai Angkatan Relawan Rakyat Malaysia ('RELA') dan Jabatan Agama Islam Wilayah Persekutuan, Kuala Lumpur ('JAWI'). Defendan pertama, seorang pegawai RELA, telah dituduh di bawah s. 509 Kanun Keseksaan mengganggu privasi perayu dengan mengambil banyak gambar-gambar perayu sedang membuang air kecil dalam trak yang beliau telah dimasukkan selepas ditangkap. Beliau memplid bersalah dan telah disabit dengan sewajarnya. Perayu mengemukakan suatu tuntutan untuk, antara lain, ganti rugi umum, teruk dan teladan terhadap defendan pertama, responden kedua, iaitu Ketua Pengarah RELA, responden ketiga, iaitu Pengarah JAWI dan responden keempat, Kerajaan Malaysia. Hakim perbicaraan membuat keputusan yang memihak kepada perayu, tetapi hanya berhubung dengan defendan pertama dan bukan responden-responden. Perayu, berasa tidak puas hati, memfail rayuan semasa.

**Diputuskan (membenarkan rayuan dengan kos)**
**Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:**

**(1)** Atas fakta-fakta, defendan pertama berada pada tempat kejadian itu, bukan atas kehendaknya sendiri, tetapi atas arahan. Beliau bukan sahaja di bawah penyeliaan terus RELA tetapi, pada malam tertentu itu, juga tertakluk kepada arahan JAWI, dengan tugas-tugasnya berulang-alik daripada memastikan keselamatan mereka yang mengambil bahagian dalam usaha itu kepada mengawasi mereka yang telah ditangkap. Oleh kerana defendan pertama mengambil gambar-gambar tanpa kebenaran semasa menjalankan tugas yang beliau telah diarah untuk melaksanakan, pada masa operasi itu sedang dijalankan, responden-responden mesti didapati mempunyai liabiliti vikarius. Ia adalah undang-undang mantap bahawa apabila suatu kecederaan atau kerugian disebabkan kepada pihak ketiga disebabkan oleh tindakan salah seseorang agen yang bertindak dalam skop kuasanya, principalnya mempunyai liabiliti bersesama dan berasingan dengannya. Oleh yang demikian, responden mesti bersesama dan berasingan menanggung beban liabiliti defendan pertama. *Keppel Bus Co Ltd v. Sa'ad Ahmad* (diikuti); *Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors* (diikuti); *Yeo Tin Sang v. Lim Choo Kee* (diikuti).

*[Diperintah sedemikian.]*

**Case(s) referred to:**
*Canadian Pacific Railway Co v. Lockhart [1942] AC 591* ***(refd)***
*Dyre and Wife v. Munday & Anor [1895] 2 QB 742* ***(refd)***
*Goh Choon Seng v. Lee Kim Soo [1925] AC 550* ***(refd)***
*Keppel Bus Co Ltd v. Sa'ad Ahmad [1972] 1 LNS 53 HC; [1974] 1 LNS 62 PC* ***(foll)***
*Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369 CA* ***(refd)***
*Rose v. Plenty [1976] 1 All ER 97* ***(refd)***
*Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors [1997] 1 CLJ Supp 39 HC* ***(foll)***
*Samin Hassan v. Government of Malaysia [1976] 1 LNS 139 FC* ***(refd)***
*Yeo Tin Sang v. Lim Choo Kee [1960] 1 LNS 164* ***(foll)***

**Legislation referred to:**
Government Proceedings Act 1956, ss. 5, 6
Penal Code, s. 509

*For the appellant - Karpal Singh (Sangeet Kaur Deo with him); M/s Karpal Singh & Co*
*For the respondent - Amarjeet Singh Serjit Singh SFC; AG's Chambers*

*[Appeal from High Court, Kuala Lumpur; Civil Suit No: S4-21-134-2003]*

*Reported by Suresh Nathan*

## JUDGMENT

**Suriyadi Halim Omar JCA:**

**[1]** The appeal was unanimously allowed with costs here and below. We found the 2nd, 3rd and 4th defendants (hereinafter referred to as the respondents) vicariously liable, jointly and severally, and ordered the sum of RM100,000 ordered by the learned judge of the High Court against the first defendant to remain unvaried. The deposit, was also refunded to the plaintiff (hereinafter referred to as the appellant).

**[2]** The appeal came about as the appellant had filed an action against the first defendant and the three respondents. The appellant's claim for, *inter alia*, general, aggravated and exemplary damages, was allowed in the above sum of RM100,000 solely against the first defendant, but not against the respondents. Being dissatisfied, the appellant filed an appeal as against the unsuccessful litigation against the respondents. There was no appeal filed by the first defendant regarding the sum of RM100,000 against him or for that matter by the respondents. It was on account of wanting to avoid any confusion of the respective relevant parties that we deliberately referred to the respective parties as the appellant, first defendant, and respondents (the 2nd, 3rd and 4th defendants).

**[3]** A perusal of the amended statement of claim shows that the relief sought against the first defendant and the respondents were on the basis of them being jointly and severally liable. With the respondents off the hook, and the first defendant a man of straw, that judgment would have remained a paper judgment, as openly admitted by counsel for the appellant. The other facts adduced in the statement of claim, and not disputed are that, the first defendant was a member of the RELA (Angkatan Relawan Rakyat Malaysia), the 2nd respondent the Director General of RELA, the

A 3rd respondent the Director of the Jabatan Agama Islam Wilayah Persekutuan, Kuala Lumpur (JAWI) and the 4th respondent the Government of Malaysia.

**[4]** It was pleaded that at about 11.30pm on 21 March 2003
B the appellant was arrested at the Kelab De Vegas at Jalan Imbi, Kuala Lumpur in a joint operation by officers of the 2nd and 3rd respondents. The appellant, together with some other persons arrested, were then put into a truck and driven off to Taman Maluri, Cheras. Enroute the appellant had requested from officers
C of the 2nd and 3rd respondents permission to use the toilet facilities but was disallowed. Instead she was scolded and told to urinate in the truck. As she was in quite a state, she asked her friends to shield her by encircling her with a shawl, in order to ease herself. At that particular moment, the 1st defendant suddenly
D opened the door of the truck, rushed in, pulled down the shawl and proceeded to take numerous photos of the appellant in a squatting position urinating. As a result, the appellant was thoroughly humiliated with the whole incident, which was within the view of everyone in the truck.

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**[5]** There was abundance of evidence as regards this invasion of privacy, amongst others, his subsequent prosecution for a charge under s. 509 of the Penal Code under arrest case C83-494-2003. He pleaded guilty and was convicted of it. He was accordingly
F sentenced to four months jail *vide*, with the sentence confirmed by the High Court *vide* a revision. In fact, this issue of the invasion of privacy was never under challenge.

**[6]** To return to the pleadings, the appellant pleaded that her privacy had been invaded, resulting in her humiliation, trauma and
G serious mental anguish. She wanted general, aggravated and exemplary damages in the sum of RM5,000,000, interest and costs from the first defendant and the respondents. She pleaded that the officers of the 2nd and 3rd respondents at the material time, had negligently failed to protect her well-being, by allowing the first
H defendant to snap those photographs. To reiterate, at the end of the trial, the learned judge found for the appellant only as regards the first defendant, but not the rest of the respondents. Neither did the first defendant nor the respondents appeal against that decision.

I

**[7]** The learned judge in her grounds of judgment found that the first defendant, together with several members of RELA who participated in the operation carried out by JAWI, did so in their official capacity. On the other hand the first defendant was never ordered to photograph any person arrested, let alone the camera used was his. His action of taking pictures of the appellant urinating was not part of his duty to ensure security but a personal one. The learned judge concluded that the respondents therefore were not vicariously liable for the acts of the first defendant.

**[8]** Perusing the memorandum of appeal, much of the grounds registered were related to the learned judge's finding of facts, but come the hearing day before us, learned counsel emphasised more on the finding that the action of the first defendant was a 'frolic of his own'. The relevant portion of those finding of facts read:

> ini kerana tindakan defendan pertama mengambil gambar plaintif tidak mempunyai sebarang kaitan dan tidak kena mengena dengan tugasnya, mengawal keselamatan pada malam tersebut.

**[9]** We now reproduce the thrust of the appellant's submission on the issue of "frolic of his own", and it reads as follows:

> ... the test where vicarious liability is concerned is whether the act was done "in the course of business". Not whether the employer authorised the act or knew that it was being done. In this case, in light of the finding of the learned High Court judge that the first defendant, was in fact at the operation in his official capacity as a RELA officer, his actions of taking the said photographs were in fact done in the course of business. It is humbly submitted that at the time the pictures were taken the first defendant was in the process of carrying out his duty as instructed to him by the third defendant. This is admitted by SD2 (he succinctly said: 'apabila kejadian ini berlaku en setuju Md Tahir itu masih diperlukan untuk mengawal-masih dalam arahan en- Ya"). He was specifically instructed by the third defendant to control those who had been arrested. In the course of doing that, the first defendant took the said photos. As it was the first defendant's duty to control those detained, it is submitted that he was in fact in charge of the plaintiff at the time. It is submitted that when the act of taking the photographs occurred the operation was still in progress. Although the said act may have been unauthorised by the third defendant, it was carried out during the normal course of duty of the first defendant as instructed by the third defendant.

**[10]** There was factual basis of the appellant's contention against the respondents as:

(a) they had admitted that the 1st defendant was a RELA officer at the material time. Further it was admitted that the 2nd respondent was the director of RELA. With the first defendant being a RELA officer he thus came under the 2nd respondent's control. (These admissions had thus established a relationship between the 1st defendant, the 2nd respondent and the 4th respondent);

(b) pertaining to the relationship between the 1st defendant and the 4th respondent, the latter had admitted that it was vicariously liable for the actions of the 2nd respondent, but only to the extent of s. 5 and s. 6 of the Government Proceedings Act 1956. To be held liable for the negligent act of its officer, there must be proceedings against the officer personally. In this case, s. 5 and s. 6 of the Government Proceedings Act 1956 had been complied with, in that there were proceedings against the 1st defendant then (*Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369). The relationship between the 1st defendant and the 4th respondent thus had been established; and

(c) at the time the pictures were taken, the 1st defendant was in the process of carrying out his duty as instructed to him by the 3rd respondent ie, to control those who had been arrested. In the course of doing so, the 1st defendant took the said photos. The act of taking the photographs occurred when the said operation was still in progress and therefore, the 3rd respondent should be equally vicariously liable.

**[11]** The federal counsel for the respondents began, as per the written submission that the photographs did not show the appellant in the act of urinating. The oral testimony was a fabrication and had been discredited by the documentary evidence. This at best was an unusual submission as both parties had agreed, and admitted further in the statement of defence, that she indeed did urinate in the truck. The fact that the learned judge decided against the first defendant shows that the appellant had established all the necessary ingredients for a case based on a balance of probability. The learned judge in her grounds of

judgment elucidated, "Saya mendapati bahawa tindakan defendan pertama mengambil gambar-gambar plaintiff yang sedang membuang air kecil ... (emphasis added)," in no uncertain terms established that a finding of fact had been made.

**[12]** As there was no appeal on this finding, it was too late in the day for the respondent's counsel to touch on the facts, which culminated in that submission. Apart from that unusual submission, counsel wanted the RM100,000 damages award be set aside, when there was no appeal filed against it.

**[13]** As regards the issue of vicarious liability, in support of the learned judge's conclusion, he ventilated that the 1st respondent was not acting in the course of employment and was in pursuit of his own misguided and personal aims when attempting to photograph the appellant. The learned federal counsel further ventilated that:

> The test to determine vicarious liability is established law and is not in dispute. In this appeal the question is whether the use of the camera by the 1st respondent was "so closely connected with the acts that he was authorised to that, for the purposes of liability of the Government as his employer, his wrongful use may fairly and properly be regarded as made by him while acting in the ordinary course of employment". If the wrongful act is not so connected then the employer is not responsible.
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> i. *Bernard v. Attorney General* [2005] 2 LRC 561;
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> ii. *Attorney General of the British Virgin Islands v. Craig Hartwell* [2004] 1 WLR 1273;
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> iii. *Lister and others v. Hesley Hall Ltd* [2001] 2 AER 769;
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> iv. *Keppel Bus Co. Ltd v. Sa'ad bin Ahmad* [1974] 1 WLR 1082;
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> v. *Keppel Bus Co. Ltd v. Sa'ad bin Ahmad* [1972] 2 MLJ 121.
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> The approach is to concentrate on the relative closeness of the connection between the nature of employment and the particular tort (*Bernard v. Attorney General* [2005] 2 LRC 561). At the end of the day every case will be decided on its own peculiar facts
>
> The fact that the employment provides the employee with the opportunity to perform the act does not necessarily mean that the act was within the scope of employment. There must be some greater connection between the tortuous act of the employee and the circumstances of employment than the mere opportunity to

commit the act which has been provided by the access to the premises which the employment afforded (*Lister and others v. Hesley Hall Ltd* [2001] 2 AER 769).

**[14]** In conclusion learned federal counsel submitted that there was no connection between the act of the first respondent and the duties for which he was entrusted. The usage of the camera had nothing to do with his duties and its use was a "frolic of his own".

**[15]** Perusing the submissions of the parties, it was no surprise to see that both parties had supplied some near similar cases and, on that excuse we refer to some of them. In *Dyre and Wife v. Munday & Anor* [1895] 2 QB 742, CA Lord Esher MR ruled:

> The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable.

**[16]** In the same case Lopes LJ remarked:

> The law says that for all acts done by a servant in the conduct of his employment, and furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he gave is exceeded.

**[17]** In *Goh Choon Seng v. Lee Kim Soo* [1925] AC 550, apart from holding the same view as above, held that where a servant did some work for which he was appointed to do, but did in a manner not authorized, and would not have authorized had he known it, the master was nevertheless liable.

**[18]** The principle of the employer being responsible for the act of its employee, in the course of his employment, was applied in its full force in *Keppel Bus Co. Ltd v. Sa'ad bin Ahmad* [1972] 1 LNS 53. In that case, the Court of Appeal of Singapore found that there was sufficient evidence for the trial judge to conclude that the conductor in hitting the respondent in a very high handed manner, was acting in the course of employment. The learned C.J had adverted to the Canadian case of *Canadian Pacific Railway Co v. Lockhart* [1942] AC 591. When the matter went up to the Privy Council the decision of the trial judge was overturned on the

premise that there was insufficient evidence to support the conclusion arrived at. What is relevant is Lord Kilbrandon's remarks in *Keppel Bus Company Ltd v. Sa'ad bin Ahmad* [1974] 1 LNS 62, where he opined:

> There is no dispute about the law. The Court of Appeal relied on the well-known passage from Salmond on Torts, which was approved in *C.P.R v. Lockhart* at page 599; it is not necessary to repeat it.
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> The Court of Appeal rightly point out that the question in every case is whether on the facts the act done, *albeit* unauthorized and unlawful, **is done in the course of employment;** that question is itself a question of fact. (emphasis added).

**[19]** So what is 'in the course of employment?' Certainly in the course of his specific work for which he is employed qualifies. In *Samin bin Hassan v. Government of Malaysia* [1976] 1 LNS 139 the driver of a Telecoms Department vehicle was negligent and had caused injuries to the appellant. He had allegedly taken the vehicle for a trial run to test the brakes. The court found as a fact that the driver had taken out the vehicle for his own purpose ie, he had gone home for lunch with it. When dismissing the appeal the Federal Court had occasion to opine:

> This appeal is concerned with the liability of the master for his servant. The master should shoulder the servant's liability if at the material time the servant was acting in the course of the employment and for the business of the employer. The meaning of the words "in the course of employment" was fully considered by the House of Lords in *Davidson v. M Robb*, and the headnotes of the Law Reports read:
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> > "In the course of employment" does not mean during the currency of the engagement, but means in the course of the work which the workman **is employed to do** and what is incidental to it and absence on leave for the workman's own purposes is an interruption of the employment (emphasis added).

**[20]** In the same case, Suffian LP referring to *Rose v. Plenty* [1976] 1 All ER 97 referred to Lord Denning's remarks which read, *inter alia*, as follows:

> In considering whether a prohibited act was within the course of employment, it depends very much on the purpose for which it was done. If it is done for his employer's business it is usually done in the course of his employment, even though it is a prohibited act …

**[21]** We now would like to refer to a case that has some legal similarities to the facts of this appeal. In *Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors* [1997] 1 CLJ Supp 39 the plaintiff was assaulted by the first and second defendants while undergoing an orientation programme at Kem Lok Kawi, a military camp in Sabah. At the material time, the plaintiff was under the charge of the first defendant, who was assigned as a duty officer to carry out the orientation programme. The second defendant was attached to the said regiment stationed in the said camp. Both defendants denied the plaintiff's claims but the learned judge found for the plaintiff. He further opined:

> Though the first defendant's acts of assault were unauthorized by the third defendant, they were carried out during the normal course of duty of the first defendant. Such being the case, his unauthorized acts have become so connected with his authorized acts that this court finds them to have become "modes-although improper modes of doing them." For this, the third defendant (the Government of Malaysia–supplied) must be held vicariously liable for the unlawful actions of this defendant.

**[22]** In this case the learned judge had made a finding that the first defendant's presence on the scene was on an official capacity. Apart from being a RELA member, and thus an employee of the Government of Malaysia having certain responsibilities to the country, he was also there to specifically assist JAWI carry out its operation. The witness for JAWI clearly stated that he was incharge of a group of fifteen JAWI and five RELA officers and had admitted in cross-examination, "saya setuju pada malam itu En Tahir bertindak atas arahan saya". The first defendant therefore was not there on his own volition but on instruction. He not only was under the direct supervision of RELA, but on that particular night was also subject to the direction of JAWI, with his duties shuttling from ensuring the security of those who participated in the exercise, and to keeping an eye over those arrested. As he took the unauthorized photographs, whilst in the course of the work or employment for which he was instructed to carry out, at

a time when the operation was in progress, the respondents must be held vicariously liable. In a nutshell, the evidence of snapping the photographs being so closely connected to his duties not only was overwhelming, but fitted well with the remarks of Lord Kilbrandon of *Keppel Bus Co Ltd v. Sa'ad bin Ahmad (supra)*. Our conclusion of the first defendant's principals being vicariously liable is also in consonant with the submission of the learned federal counsel that "at the end of the day, every case will be decided on its own peculiar facts."

**[23]** With the above findings concretized the respondents must jointly and severally bear the burden of the first defendant's liability. It is trite law that when an injury or loss is caused to a third person by the wrongful act of an agent acting within the scope of his authority his principal is jointly and severally liable with him (*Yeo Tin Sang v. Lim Choo Kee* [1960] 1 LNS 164).

**[24]** Based on all the above reasons we allowed the appeal with costs.